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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 507

MARYLAND CASUALTY COMPANY,
Petitioner,

—against—

FIRST NATIONAL BANK IN YONKERS,
Respondent,

and

THE CITY OF NEW YORK, WILLIAM CASEY & SONS, INC., UNITED STATES OF AMERICA, CHARLES H. HANSON, CHARLES W. GRANT, JAMES MARTIN, ROBERT M. JOHNSON, As Trustees of the New York City Carpenters' Welfare & Pension Fund, and LIBERTY MUTUAL INSURANCE COMPANY,
Defendants.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

FRANKLIN NEVIUS,
Attorney for Petitioner,
115 Broadway,
New York 6, New York.

Of Counsel
EMIL V. PILZ
J. EDWARD DAVEY, JR.

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No.

MARYLAND CASUALTY COMPANY,

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—against—

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THE CITY OF NEW YORK, WILLIAM CASEY & SONS, INC., UNITED STATES OF AMERICA, CHARLES H. HANSON, CHARLES W. GRANT, JAMES MARTIN, ROBERT M. JOHNSON, As Trustees of the New York City Carpenters' Welfare & Pension Fund, and LIBERTY MUTUAL INSURANCE COMPANY,

Defendants.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The above named Petitioner, Maryland Casualty Company (hereinafter referred to as "the Casualty Company"), respectfully shows to the Court as follows:

This is a petition for a writ of certiorari to the United States Court of Appeals, Second Circuit, to

review that portion of the decision of that Court which reversed that part of the judgment of the United States District Court for the Southern District of New York in favor of the Casualty Company as to the First National Bank in Yonkers (hereinafter referred to as "the Yonkers Bank"), and remanded the action with directions to enter judgment in favor of the Yonkers Bank in the sum of $47,133.90.

Opinions of the Courts Below

The opinion of the United States District Court for the Southern District of New York is reported at 177 F. Supp. 175 (156a-167a).* The opinion of the Court of Appeals, Second Circuit, is reported at 290 F. 2d 246.

Jurisdiction

The decision of the Court of Appeals was dated and entered April 27, 1961. The petition for rehearing of the Casualty Company was denied August 1, 1961. The jurisdiction of this Court is invoked under U.S.C. Title 28, section 1254.

Question Presented

Whether petitioner, the Casualty Company, by reason of its blanket indemnity agreement and bond with William Casey & Sons, Inc. (hereinafter referred to as "Casey"), of October 4, 1955, or the Yonkers Bank, by reason of its assignment from Casey of

* The letter "a" signifies references to the Court of Appeals appendices.

February 7, 1956, is entitled to the sixth progress payment in the amount of $47,133.90 presently held by the City of New York (hereinafter referred to as the "City") and attributable to work performed by Casey.

Statement

The facts are as follows:

On October 18, 1955 the City, acting through its Commissioner of Public Works, entered into Contract with Casey whereby Casey was to construct certain sewers (63a). In connection with said contract, performance and payment bonds were executed by Casey, as principal and the Casualty Company, as surety, on October 4, 1955 (42a-52a).

Casey commenced the work and after working on the project for at least 2 months, assigned on February 7, 1956, to the Yonkers Bank "all money * * * due or to become due" under the contract in exchange for "$1 and other valuable considerations" (64a). Thereafter the Yonkers Bank made continual advances to Casey in the amount of $50,000 no part of which has been repaid (64a).

During the month of May, 1956, the Casualty Company, at the request of Casey, advanced $57,993.91 so as to enable Casey to meet its payroll and to purchase materials necessary for the performance of its contract (138a). Despite this assistance from the Casualty Company, Casey was unable to continue with the work and suspended operations at the project some time before June 4, 1956. Thereafter, on June 6, 1956,

the City, through its Commissioner of the Department of Public Works, demanded that Casey show cause why it should not be held in default (141a). Pursuant to this notice, hearings were held on June 11 and June 13th, and on the latter date, Casey was formally declared to be in default (143a). Thereafter, and in accordance with the demand made upon it by the City, the Casualty Company completed the contract at a net loss to it of $682,637.52 (133a).

Under the terms of its contract with the City, Casey was entitled to submit to the Engineer a requisition for progress payments no oftener than once a month (139a). With respect to such payments its contract provided that after the requisition was submitted, the City engineer, if the requisition were satisfactory, would within eight days of the submission, certify a voucher for the payment which the Commissioner of Public Works would approve after which the voucher would be delivered to the Comptroller for payment within fifteen days from the filing of the voucher in his office. Casey, shortly after May 15, 1956, submitted a requisition for the sixth progress payment for work performed prior to that date. The City Engineer approved the requisition and prepared a voucher for the approval of the Commissioner of Public Works. By May 28, 1956 the Deputy Commissioner of Public Works approved a voucher in the amount of $47,133.90. The approved voucher was then forwarded to the Comptroller's office on May 28, 1956 and was filed there on May 29, 1956 (131a).

Article 41 of the City Contract provides that the contractor shall submit to the Comptroller in connection with any application for partial payment a veri-

fied statement in the form prescribed by the Comptroller setting forth the information required under Section 220-a of the New York Labor Law; but by the time the voucher was to be paid (15 days after May 29, 1956) on the 13th of June, 1956, Casey was already in default under its contract and could not supply such affidavit because it had not paid its workmen for as the Trial Judge pointed out the surety paid the payrolls and material bills (158a).

The action was originally commenced by the Yonkers Bank in the New York Supreme Court, New York County in order to recover the amount of the sixth progress payment presently held by the City. Joined as defendants were: The City; Casey; the Casualty Company; four individual trustees of the New York City Carpenters' Welfare & Pension Fund which obtained a judgment against Casey for welfare and pension fund contributions due for the years 1955 and 1956; Liberty Mutual Insurance Company (hereinafter referred to as "Liberty Mutual") which, having furnished workmen's compensation and public liability insurance coverage to Casey for the project, claimed the sum of $39,903.24 for unpaid insurance premiums, and the United States of America (hereinafter referred to as the "United States") which claimed that Casey was liable to it for $110,390.83 in taxes withheld from wages paid by it at the construction project.

Pursuant to 28 U.S.C. §§ 1444 and 2410, the United States removed the case to the United States District Court for the Southern District of New York where it and the Casualty Company moved for summary judgment. In its opinion dated July 28, 1959, the

District Court granted the motion of the Casualty Company but denied that of the United States (156a-167a). It did so on the grounds that Casey was legally in default at least as early as June 6, 1956, and that therefore there was as of that date no obligation payable from the City to Casey; hence, no funds to which the government's tax lien or the rights of the Yonkers Bank, as assignee of Casey, could attach. With respect to the conflicting equities of the Casualty Company and the Yonkers Bank, the District Court found further support for its holding that the Casualty Company was properly entitled to the fund, in the principle that where the payment is still in the hands of a stakeholder, a completing surety's rights are superior to those of a formal assignee of the contractor since its rights arise at the time of the making of the surety contract. On September 2, 1959, the District Court granted the motion of the Yonkers Bank for reargument and, on reargument adhered to its original opinion.

From the foregoing rulings, the Yonkers Bank, Liberty Mutual and the United States appealed to the Court of Appeals for the Second Circuit but thereafter the United States abandoned its appeal and agreed to its dismissal.

In its decision of April 27, 1961 the Court of Appeals affirmed that part of the judgment which granted summary judgment in favor of the Casualty Company as to Liberty Mutual but reversed that part of said judgment in favor of the Casualty Company as to the Yonkers Bank and remanded the case with directions to enter judgment in favor of the Yonkers Bank in the sum of $47,133.90.

By its order dated August 1, 1961 the Court of Appeals denied the petition of the Casualty Company for rehearing. On September 19th, 1961 said Court granted the motion of the Casualty Company to stay issuance of mandate pending application for a writ of certiorari to this Court provided that it make such application within thirty days.

Specification of Errors to Be Urged

The Court of Appeals erred:

1. In holding that Casey was not in default until it received on June 14 the Comptroller's written notice of his June 13 declaration of default.

2. In holding that prior to the receipt by Casey on July 14 of the City's formal declaration of default, the City had no power to retain the sixth progress payment.

3. In holding that the sixth progress payment had become due to Casey before it received formal notice of the default declaration.

4. In failing to hold that the superior equity of the Casualty Company to the sixth progress payment arose as of October 4, 1955, at the time it executed its performance and payment bonds as surety to the City which was before the assignment to the Yonkers Bank was filed and that by reason of such priority, the equity of the Casualty Company with respect to the involved funds is superior to that of the Yonkers Bank.

5. In granting summary judgment despite the presence of genuine and material issues of fact.

Reasons for Granting the Writ

(a) The Court below failed to apply the applicable rule governing the rights of completing sureties of the contractor as expressed by the Court of Appeals of the State of New York and the Court of Appeals for the Second Circuit.

(b) The Court in its decision of reversal has not applied the rules laid down by this Court in cases involving the rights of completing sureties against an assignee of the contractor.

(c) The principle involved in this case is one of great importance as regards the rights of sureties under bonds guaranteeing the proper performance of building construction contracts with public agencies.

THE FIRST GROUND

The Court of Appeals erred in failing to hold that, in accordance with the applicable decisions of the Court of Appeals of the State of New York and of the Court of Appeals for the Second Circuit, the Casualty Company, both under the terms of the involved contracts and under well established rules of suretyship, is entitled to the involved sum in the amount of $47,133.90.

Inasmuch as the involved contracts between Casey and the City and between Casey and the Casualty Company were executed and performed in New York, New York law is determinative of the issues.

The law in New York governing the claim of the Yonkers bank, as the assignee of Casey, is stated in:

> *Scarsdale National Bank and Trust Company v. United States Fidelity and Guaranty Company*, 264 N. Y. 159.

In the *Scarsdale* decision, supra, in holding under fact similar to those here that a surety's rights of subrogation to moneys earned but unpaid at the time the contractor abandoned the work were superior to those of the assignee of the contractor, the Court of Appeals stated at page 162:

> "After July 10, 1931, when the Cook Contracting Company defaulted, the State could have completed the work and retained all money due t the contractor at the time of the default and apply it to the cost of completion. The deficiency, or loss sustained by the State, would have been an obligation of the bonding company and could have been collected from it by the State. Under these circumstances the assignee would not have been entitled to this sum of $10,746.29. It had no better rights under the contract than the contractor and, if the State, as against the contractor, could apply these earned moneys to the cost of completion, it could do the same thing as against the assignee. In other words, the moneys due at the time of the default, called the earned moneys, could and would be applied by the State in reducing the amount due on the defendant's bond.
>
> Does it make any difference in the application of these earned moneys that the surety company complied with the demand of the State and completed the job at its own expense? Upon what

principle, or, according to what reasoning, would the earned moneys in one instance inure to the benefit of the defendant and not in the other? The answer attempted to be made is, that the assignee-bank's money went into the work and left just so much less to be completed."

The Court continued at page 163:

"The bonding company succeeded to all these rights of the State, under the principle of subrogation. Having completed the work in behalf of the State, it was subrogated to all the rights of the State as against the contractor. This was not a right given to it by the judgment of the court, or arising at the time of the default. It was implicit in its undertaking and agreement with the State. This equitable right of subrogation was created on December 8, 1930, at the time the defendant executed its bond as surety to the State months before the assignment to the bank. The bond was linked up to the contractor's contract. The performance, which was guaranteed, was the performance of this contract, which had in it the right of the State to apply earned moneys toward completion. Probably the same rights would have existed if article XXII, above quoted, had not been in the contract. However, we are here dealing with the contract which contained the right to retain earned moneys and apply them on the cost of any completed work. To all rights under this contract the bonding company was subrogated. The equity in favor of the surety company *arose* at the time of the giving of its bond. The right *became available* when the surety company com-

pleted the work at a loss. (*Prairie State Bank* v. *United States*, 164 U.S. 227, at pp. 232, 237, 240.) The equitable lien arose at the time of the execution of the bond and was thus superior to the assignment. (*Exchange State Bank* v. *Federal Surety Co.*, 28 Fed. Rep. (2d) 485, 488.) This is the reasoning and the rule adopted by the weight of authority. (*Maryland Casualty Co.* v. *Board of Water Comrs.*, 66 Fed. Rep. (2d) 730, and *Lacy* v. *Maryland Casualty Co.*, 32 Fed. Rep. (2d) 48; as well as the case of *Prairie State Bank* v. *United States*, 164 U.S. 227; *Henningsen* v. *U. S Fidelity & Guaranty Co.*, 208 U.S. 404; *Hardaway* v. *National Surety Co.*, 211 U. S. 552.) We held nothing to the contrary in *Arrow Iron Works, Inc.* v. *Greene* (260 N.Y. 330) and *Laski* v. *State* (217 App. Div. 420; affd., 246 N.Y. 569)."

Despite the clear applicability of the *Searsdale* decision, supra, to the issues here presented, the Court of Appeals in its opinion of reversal has not applied the principle expressed by the New York Court of Appeals in this leading decision.

In *Stanton* v. *Baker-Comeau & Co., Inc.*, 168 Misc. 190 at 200, aff'd. 260 App. Div. 831, leave to appeal denied 260 App. Div. 980, the court specifically held that in the *Searsdale* case the Court of Appeals determined that the completing surety was fully subrogated to all of the rights of the State as against the contractor and that under *Searsdale* it was held that moneys earned and unpaid at the time the contractor abandoned its work, as well as retained percentages, were properly directed to be paid to the surety which completed the work at a loss.

See also:

> *United States Fidelity and Guaranty Company* v. *Triborough Bridge Authority*, 297 N.Y. 31.

In the *United States Fidelity and Guaranty Company* decision, supra, a contractor, as principal, and plaintiff, as surety, executed a bond in the form required by a contract for the construction, for defendant Triborough Bridge Authority, of a public improvement, and conditioned upon the contractor's payment of all claims for labor and materials furnished. At the time the completed work was accepted by defendant authority, the contractor was in default as to moneys owing the subcontractors for labor and materials and plaintiff surety thereupon satisfied such unpaid claims. The Court held that under principles of subrogation the surety succeeded to the right of the Authority, as owner, against the contractor to withhold money due the contractor and to apply it in payment of the unsatisfied claims for labor and materials. Such equity in the surety's favor arose at the time it gave its bond and the right became available and enforceable when it carried out the provisions of the contract. In so holding the Court of Appeals of the State of New York stated at page 35:

> "The conclusion of the courts below—that the surety's rights are prior to those of the intervener—is in accord with settled law. (See e.g., *Scarsdale Nat. Bank & Trust Co.* v. *United States Fidelity & Guar. Co.*, 264 N.Y. 159; *Prairie State Bank* v. *United States*, 164 U.S. 227; *American Surety Co.* v. *Sampsell*, 327 U.S. 269.) Plaintiff succeeded—under principles of subrogation—to

all rights which defendant Authority might have against the contractor, including that of withholding money due the contractor and of applying it to the payment of unsatisfied claims for labor and materials furnished."

At page 37 the Court continued:

"In addition, it is, of course, settled that intervener's rights to the moneys held by defendant Authority can be no greater than those which its taxpayer—the contractor—had. (*Karno-Smith Co.* v. *Maloney*, 112 F. 2d 690, 692; Internal Revenue Code §3670; U.S. Code, tit. 26, §3670.) Here the contractor's rights to the fund were clearly subordinate to the right of defendant Authority—and, by subrogation, of plaintiff—to withhold and apply those moneys to the payment of unsatisfied claims for labor and materials. So long as such claims were outstanding and unpaid and so long as defendant Authority had the right to withhold and apply, the contractor had no rights to the fund, and, consequently, had no property interest therein upon which intervener could place a lien."

Following the *United States Fidelity and Guaranty Company* decision, supra, the Court of Appeals of the State of New York again held the surety to be entitled to the fund in

Aetna Casualty & Surety Company v. *United States of America*, 4 N.Y. 2d 639.

In the *Aetna* decision Chief Judge Conway said at pages 644-645:

"The law of the *Triborough* case, followed in

other cases, is well-settled law. (See *Scarsdale Nat. Bank & Trust Co.* v. *United States Fidelity & Guar. Co.*, 264 N.Y. 159, 163-164; *Matter of United States Cas. Co.* v. *Met. Contr. Corp.*, 11 Misc. 2d 492; *Matter of (Amer.) Lumbermen's Mut. Cas. Co.* v. *Great Atlantic Constr. Corp.*, 11 Misc. 2d 491; *Fidelity & Deposit Co.* v. *New York City Housing Auth.*, supra, pp. 144, 146; *Vincent* v. *Matthews Co.*, 126 F. Supp. 102; *Alabama-Tennessee Natural Gas Co.* v. *Lehman-Hoge & Scott*, 122 F. Supp. 314; *Royal Ind. Co.* v. *United States*, 93 F. Supp. 891, 899; *Matter of Cummins Const. Corp.*, 81 F. Supp. 193, 196-197.) The net effect of these cases is that Horticultural had no interest in the funds presently held by the Authority to which the tax lien could attach. Consequently inasmuch as Aetna's losses far exceed the funds held by the Authority, it was entitled to recover the full unpaid balance of the contract price—(1) $9,444.02 on the Berry project, and (2) $1,860.75 on the Patterson Project. The United States is entitled to nothing out of these funds."

It is noted that the Court of Appeals, in holding that the City did not have the right to retain the sixth partial payment, assumed that only Articles 45 and 48 of the contract are applicable to the involved situation. Consequently it appears that the Court paid no attention to Articles 12, 16, and 23 each of which authorizes the City under certain conditions to retain moneys due the contractor. Petitioner submits that the failure of the Court to consider the above numbered Articles seriously prejudiced its case and that this oversight by the Court furnishes further grounds for review by this Court.

Also, it is noted that in referring to the certificate required under section 220-a of the New York Labor Law the Court of Appeals held that the City had never demanded that Casey file such a statement and that its failure to do so constituted a waiver of its right to withhold payment until such a statement was furnished.

It is the contention of your petitioner that the Court clearly erred in finding a waiver in that section 220-a is mandatory since it states that it shall be the duty of the Comptroller to require the contractor to file the statement in writing and that accordingly the City lacked the power to waive the certificate required under section 220-a.

In this connection the well settled law in New York is that when the act to be done concerns either the public interest or the rights of third persons (as in the instant case), permissive words in a statute will be construed as mandatory.

> *Vulcan Rail & Constr. Co., Inc.* v. *County of Westchester*, 250 App. Div. 212 at 220;
> *People ex rel. Cayuga Nation* v. *Land Comrs.*, 207 N.Y. 42;
> *People ex rel. Doscher* v. *Sisson*, 222 N.Y. 387.

Certainly the opinion of reversal is inconsistent with the effect of the above cited decisions and is erroneous in finding the presence of a waiver as the City is actually without power to waive the statutory requirements of Section 220-a.

In a recent decision the Supreme Court of the State of New York had occasion to consider and decide whether the holding by the district court in the instant case was in accordance with the law of New

York. It agreed that such was the fact "beyond debate".

> *State Bank of Albany* v. *Dan-Bar Contracting Co., Inc.*, 23 Misc. 2d 487, Affd. 12 A.D. 2d 416.

In the *State Bank* case, supra, Mr. Justice Bookstein stated at page 495:

> "*First National Bank* v. *City of New York* (177 F. Supp. 175) presented the precise question determined in the *Scarsdale* case (supra) and followed it. The case was one where the surety completed the project under the performance bond at a cost greatly in excess of the balance due on the contract. The court held that the surety, under the subrogation doctrine, had priority to the unpaid balance due the contractor over the bank which had an assignment from the contractor as well as over some other asserted liens and claims, including a Federal tax lien. *The soundness of the determination in that case is beyond debate.*" (Emphasis added.)

The Decisions of the Court of Appeals for the Second Circuit Which We Consider Are Contrary to the Instant Decision

> *Fidelity and Deposit Company of Maryland* v. *New York City Housing Authority*, 241 Fed. 2d 142 (2nd Cir. 1957);
>
> *Massachusetts Bonding and Insurance Company and United States of America* v. *State of New York, In re Fago Construction Corporation*, 259 Fed. 2d 33 (2nd Cir. 1958).

While these two cases involved the matter of the priority of the Government lien the principles enunciated in each case is controlling here, i.e., that the highest Court of the State of New York has determined that a failure to pay laborers and materialmen is a breach of contract, a contractor who fails to make such payments has no right under the contract and a surety company which pays such laborers and materialmen under principles of subrogation is entitled to a prior claim against traceable portions of progress payments which might be made by an owner to a contractor after the surety commences supervising the contractor's operations which work was ultimately completed by the surety.

THE SECOND GROUND

The Court below has decided the issues in a way in conflict with the decisions of this Court.

The Court in its decision of reversal herein has not applied the rules laid down by this Court in cases involving the right of completing sureties against an assignee of the contractor.

> *Henningsen* v. *United States Fidelity & Guaranty Co.*, 208 U.S. 404;
> *Prairie State National Bank* v. *U.S.*, 164 U.S. 227.

Thus in the *Henningsen* decision, supra, this Court held that the surety on the bond of a public contractor conditioned for the faithful performance of a contract, and the prompt and full payment of laborers

and materialmen, has an equity, under the doctrine of subrogation, in the sums due from the government under the contract, which is superior to the claim of a bank under an assignment from the contractor to secure the repayment of money loaned.

Moreover as assignee under its blanket indemnity agreement executed on October 21, 1954, the Casualty Company takes priority over the assignment to the Yonkers Bank (which assignment was executed February 7, 1956) because its assignment was first in time and therefore first in right.

Salem Trust Co. v. *Manufacturers Finance Co.*, 264 U.S. 182 and
Lacy v. *Maryland Casualty Co.*, 32 F. 2d 48.

In the *Lacy* decision, supra, it was held at page 51:

> "The question arises whether this superior equity of the surety extends to the current estimates payable under the contract or merely to the retained percentage. We think that it extends to both. The equity arises because of the obligation of the surety to perform the contract of the principal. Upon his performance of this contract, equity subrogates him to all rights of the obligee as against the principal. Now the obligee, upon default of the principal, is without doubt entitled to apply all moneys unpaid towards the performance of the contract, ignoring any assignments by the principal; and it necessarily follows that the surety upon performing the contract, being subrogated to the rights of the obligee, is entitled to the moneys unpaid so far as necessary to reimburse his loss."

This principle of priority was certainly overlooked by the Court of Appeals in its decision reversing the trial court and should be corrected by this Court.

THE THIRD GROUND

The principles involved in this case are of great importance in so far as the rights of a completing surety as opposed to those of an assignee are concerned and should be settled by this Court.

As seen from the above-cited decisions, it has long been the established rule in New York that under the subrogation doctrine a completing surety possesses an equity in the unpaid balance due the contractor superior to that of a subsequent assignee. Accordingly, sureties generally have relied upon this principle in extending their bonds to contractors engaged in the construction of public improvements.

The decision of the Court of Appeals would in a great many instances deprive sureties of the protection which they have enjoyed under the law prior to said decision. Said decision would therefore have a highly disturbing effect as regards the relationship of surety and principal; and, by depriving the surety of a position which it heretofore enjoyed, and by thus increasing its risk in the event of the principal's default, would result in the surety being required to charge higher premiums on performances and payment bonds issued in connection with work on public contracts. These increased premiums would have to be passed on to the public agencies involved in the form of higher bids. Thus the public would be pay-

ing more for improvements than otherwise necessary. Certainly this is contrary to the public interest. A decision which accomplishes such a undesirable result by reasoning which is at variance with decisions of the highest court of the State of New York and of this Court, warrants review by this Court.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

FRANKLIN NEVIUS,
Attorney for Petitioner.

Of Counsel
EMIL V. PILZ
J. EDWARD DAVEY, JR.

Dated: October 17, 1961

APPENDIX A

Judgment of Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-seventh day of April one thousand nine hundred and sixty-one,

Present: HON. J. EDWARD LUMBARD,
Chief Judge,
HON. STERRY R. WATERMAN,
HON. LEONARD P. MOORE,
Circuit Judges.

FIRST NATIONAL BANK IN YONKERS,
Plaintiff-Appellant,

v.

LIBERTY MUTUAL INSURANCE COMPANY,
Defendant-Appellant,

THE CITY OF NEW YORK, WM. CASEY & SONS, INC., (et al.),
Defendants,

UNITED STATES OF AMERICA,
Defendants.

Appeal from the United States District Court for the Southern District of New York.

Judgment of Court of Appeals

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now ordered, adjudged, and decreed that that part of the judgment of said District Court in favor of Maryland Casualty Company be and it hereby is affirmed as to Liberty Mutual Insurance Company.

It is further ordered that that part of the judgment in favor of Maryland Casualty Company be and it hereby is reversed as to First National Bank in Yonkers and that the action be and it hereby is remanded with directions to enter judgment in favor of the First National Bank in Yonkers in the sum of $47,133.90 in accordance with the opinion of this court; with costs to plaintiff-appellant.

A. DANIEL FUSARO
Clerk

APPENDIX B

Opinion of Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 80—October Term, 1960.

(Argued November 14, 1960 Decided April 27, 1961.)

Docket No. 26028

FIRST NATIONAL BANK IN YONKERS,
Plaintiff-Appellant,

—v.—

MARYLAND CASUALTY COMPANY,
Defendant-Appellee,

THE CITY OF NEW YORK, WILLIAM CASEY & SONS, INC., UNITED STATES OF AMERICA, CHARLES H. HANSON, CHARLES W. GRANT, JAMES MARTIN, ROBERT M. JOHNSON, As Trustees of the New York City Carpenters' Welfare & Pension Fund,
Defendants,

LIBERTY MUTUAL INSURANCE COMPANY,
Defendant-Appellant.

Before:

LUMBARD, *Chief Judge*,
WATERMAN and MOORE, *Circuit Judges*.

Plaintiff commenced an action in the District Court for the Southern District of New York, John M. Cashin, *J.*, to recover payments allegedly due to it

upon a construction contract to its assignor, the contractor who had defaulted upon the contract. Defendant Maryland Casualty Company's motion for summary judgment was granted and plaintiff and defendant Liberty Mutual Insurance Company appeal.

The summary judgment in favor of Maryland Casualty Company is reversed as to plaintiff and affirmed as to the Liberty Mutual Insurance Company; the case is remanded with directions to enter judgment in favor of the First National Bank in Yonkers.

GERALD M. SMITH, New York, N. Y. (Samuel Gottesman, New York, N. Y., on the brief), *for plaintiff-appellant.*

EMIL V. PILZ, New York, N. Y. (Nevins, Jarvis & Pilz, New York, N. Y., on the brief), *for defendant-appellee.*

RAYMOND GITLIN, New York, N. Y. (Benjamin Rosen, New York, N. Y., on the brief), *for defendant-appellant.*

LUMBARD, *Chief Judge*:

This case arises out of the breach by William Casey and Sons, Inc., of its contract to construct sewers in Bowery Bay for the City of New York. The City has been satisfied since The Maryland Casualty Company, appellee herein, completed the sewers pursuant to its bond guaranteeing Casey's performance. Involved in this appeal are the competing claims of the First National Bank in Yonkers, the Maryland Casualty

Company and the Liberty Mutual Insurance Company to $47,133.90, held by the City, and attributable to work done by Casey and approved for payment by the City Engineer before Casey had been formally declared in default.

An action to recover $47,133.90 was brought in the Supreme Court of New York County by appellant, the First National Bank in Yonkers, which, prior to Casey's breach, had allegedly received an assignment of all money due or to become due under the contract. Joined as defendants were: the City, Casey, the Casualty Company, four individuals as trustees of the New York City Carpenters' Welfare & Pension Fund, the Liberty Mutual Insurance Company and the United States of America.[1] The case was removed to the district court by the United States acting pursuant to 28 U. S. C. §1444 and §2410.

Casey made no answer to the complaint and the trustees, who held an unsatisfied judgment against Casey for welfare and pension contributions, moved to dismiss the complaint. The United States, the Casualty Company and Liberty Mutual filed cross-claims against the City in which they demanded the $47,133.90 or some portion of it. The United States alleged that the money was owing to Casey but that Casey, in turn, was liable to it for $110,390.83 in taxes withheld from wages paid at the construction project. Liberty Mutual, asserting that it was entitled to be paid $39,903.24 owed it by Casey in premiums for workman's compensation insurance at the project,

[1] The parties will be referred to throughout as the Yonkers Bank, or occasionally the Bank, the City, Casey, the Casualty Company, the trustees, Liberty Mutual and the United States.

claimed that the Casualty Company had a cause of action for the money but in turn was liable to it upon the surety bond that guaranteed Casey's payment for "services rendered." The Casualty Company, which also sought certain other funds in the City's possession,[2] contended that it was entitled to the fund by reason of the $682,637.52 loss it sustained in completing the contract. The City admitted that it held the money but stated that it knew not who was entitled to it.

After their answers, the United States and the Casualty Company moved with supporting affidavits for summary judgment. The motion of the Casualty Company was granted and that of the United States denied. From these rulings, the Bank, Liberty Mutual and the United States appealed but thereafter the United States abandoned its appeal and agreed to its dismissal.

I.

The construction contract between Casey and the City and the Casualty Company's surety contract guaranteeing Casey's performance were entered into in October of 1955. On February 7, 1956, after working on the project for at least two months, Casey assigned to the Yonkers Bank "all money * * * due or to become due" under the contract in exchange for "$1 and other valuable consideration." The Yonkers Bank made continual advances to Casey of which it has not been repaid $50,000, owing since May 10, 1956.

[2] These other funds are not before us. Judge Cashin dismissed the Casualty Company's claim for them as premature and no appeal was taken from that portion of Judge Cashin's order.

Sometime during the middle of May, Casey met with financial difficulties which the Casualty Company attempted to alleviate by advancing funds, allegedly $57,993.91, to cover Casey's payroll and purchase of necessary materials. The Casualty Company's aid, however, was apparently not sufficient because Casey suspended operations at the project sometime before June 4, 1956. Two days later, on June 6, the Commissioner of the City's Department of Public Works demanded that Casey show cause why it should not be held in default. Pursuant to this notice, hearings were held on June 11 and June 13, and on the latter occasion, the Commissioner formally declared Casey to be in default. The district court held, however, that Casey's rights to further payment ceased on June 6, 1956, when he was "legally" in default and that the City was entitled to retain the $47,133.90, since under no theory had the $47,133.90 become payable to Casey by June 6, and granted summary judgment to the Casualty Company which was subrogated to the City's rights by virtue of having completed the contract at a loss.[3] *Scarsdale National Bank & Trust Co. v. United States Fidelity & Guaranty Co.*, 264 N. Y. 159 (1934).[4] In so holding the trial court was in error.

[3] The Casualty Company is also subrogated to Casey's rights. If the money at issue was due to Casey despite his default, and if Casey was liable to the Yonkers Bank on the assignment, however, this is of no value to the Casualty Company since all money due to Casey was payable to the Yonkers Bank.

[4] New York law is determinative of the issue. The sewers were to be built in New York and payment was to be made from the office of the Comptroller of the City of New York.

The question of the applicable law in a case of this sort when the United States Government is claiming a tax lien is not before us. Compare *Fidelity & Deposit Co. of Maryland v. City of New York*, 241 F. 2d 141, 145 (2d Cir. 1957).

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An analysis of the contractual provisions and the documentary evidence leads us to the conclusion that the sixth progress payments was payable to Casey and, hence, to the Yonkers Bank by assignment before the City acquired any right of retention. We hold that the City had no power to retain funds on account of Casey's default, and that the $47,133.90 had become due to Casey before it received notice of the default declaration. Finally, we hold that if the assignment by Casey to the Yonkers Bank was valid, the City had no power under Article 48 of the construction contract —which gave the City the power, after the contractor's default, to retain "such monies as would have been payable to the contractor if he had completed the work * * *"—or otherwise to withhold from the Yonkers Bank money that was payable to Casey before the default declaration. Since the Bank had advanced $50,000 to Casey which was unpaid, we remand the case with directions to enter judgment for the bank in the sum of $47,133.90.

II.

We must deal first with the preliminary question of whether Casey's failure to file a statement required by Article 41 of the contract setting forth the wages owing to his laborers freed the City from any obligation to pay the progress payments. We hold that it did not. Though it is conceded that Casey failed to file such a statement, the City never demanded that Casey do so.[5] Therefore, we agree with the Bank that

[5] The City's answer and its Chief Auditor's description of the Comptroller's records state that payment was withheld because Casey defaulted. Their failure to add that the money was withheld because Casey had not complied with §220(a) of the New

since the City had ample time to demand the statement, its failure to do so constituted a waiver of its right to withhold payment until such a statement was furnished.

III.

We now turn to our conclusion that the sixth progress payment of $47,133.90 had become payable to Casey before it received notice on June 14.

Shortly after May 15, 1956, Casey submitted a requisition for work done prior to that date. The City Engineer approved the requisition as required and prepared a voucher for the approval of the Commissioner of Public Works. By May 28, 1956,[6] the Deputy Commissioner of Public Works[7] approved a voucher for $47,133.90. The contract then required the Deputy Commissioner to file the voucher with the Comptroller and provided that "payment * * * less any and all deductions authorized to be made by the Comptroller * * * will be made by the

York Labor Law, referred to in Article 41, can indicate only that the City had not insisted that it do so.

The Casualty Company's answer, which relied heavily upon Casey's failure to file the wage information, was filed on September 26, 1958, long before the City filed its exhibit, dated December 24, 1958 or its answer, dated January 6, 1959. Therefore, the Casualty Company cannot contend that the City would not have thought of mentioning the ground for retention of money that is here discussed.

[6] The Yonkers Bank claimed that the voucher was approved on May 23, 1956. An affidavit for the City is ambiguous but seems to say that May 28, 1956 is the correct date. The difference is not material to the issues in this case.

[7] The fact that action was taken by the Deputy Commissioner rather than the Commissioner we do not believe to be of significance. Cf. *Jay* v. *Boyd*, 351 U. S. 345 (1956); *Kimm* v. *Rosenberg*, 363 U. S. 405, 408 (1960).

Comptroller within fifteen (15) days after the filing of such voucher in his office." The approved voucher was forwarded to the Comptroller's office by the Deputy Commissioner on May 28, 1956, and according to the City the voucher was received and filed on May 29, 1956.[8]

Therefore, the City was under an obligation to make the payment approved by the voucher "less any and all deductions authorized to be made by the Comptroller" within fifteen days from May 29, the date the City claims the voucher was filed. This period expired at the end of the fourteenth day, June 12.

But Casey was not in default until it received on June 14 the Comptroller's written notice of his June 13 declaration of default.

Significant is the City's use of the word "declare" in Articles 45 and 48 of the contract. Article 45 covers the "Commissioner's Right to Declare Contractor in Default." After listing various grounds for default, a procedure is specified whereby before exercising "his right to declare the Contractor in default" he shall give the Contractor an opportunity to be heard on two days' notice. Under Article 48 "after declaring the Contractor in default," the Commissioner was entitled to have the work completed by other means and then charge the expense of such completion against "monies as would have been payable to the Contractor if he had completed the work."

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[8] We credit the City's specific allegations on this point, rather than the unsupported assertions of the Bank that the voucher was received by the Comptroller on May 28. Cf. *De Luca* v. *Atlantic Refining Co.*, 176 F. 2d 421, 423 (2d Cir. 1949), cert. denied 338 U. S. 943.

Default thus was not to be objectively determined by an act or failure to act but only by a declaration by the Commission after a hearing.

Accepting the dictionary and common meaning of "declare" as "To make known explicitly, esp. by language; to communicate clearly to others, whether by acts, words, writing or signs; to publish; announce;" (Webster, New International Dictionary, 2nd Ed. unab.), the method chosen by the City to make its decision known was by letter to Casey. The letter dated June 13 itself states that the explanations offered by Casey in the hearings of June 11 and 13 were not acceptable and that "Under the circumstances, therefore, you are hereby notified that you are declared in default * * *" The letter further stated "*Upon receipt of this notice* you shall immediately discontinue all further operations under this contract and shall immediately quit the site leaving untouched all plant materials, equipment, tools, and supplies now on the site." [Emphasis supplied] The plain meaning of these words is that notice to Casey is intended and that such notice is to be given "hereby," i.e. by the letter; "notice" and "notify" by root derivation and accepted usage contemplate knowledge which could be obtained only by receipt of the June 13 letter. Thus, the City in practice showed that a state of default was to be declared by a notice which the City chose to give in written form.

As we have said, the payment voucher dated May 28 was filed on May 29. Although the record does not disclose when the June 13 letter was received by Casey, the letter must have been written and mailed after the hearing on June 13. Assuming a mail transit

period of a day, notice of default would not have been received until June 14.

IV.

We now turn to consider whether the City had any right under Article 48 of the contract or otherwise to retain money that had become due and payable before default. We conclude that it did not.

Article 48 gave the City the power to retain "such monies as would have been payable to the Contractor if he had completed the work." We do not think this covered the sixth progress payment. The language "[money that] would have been payable" does not include money that had already become payable, as had the sixth progress payment.

There are two other funds to which Article 48 would apply for the protection of the City after Casey's default: first, $60,434.60 which represented 5% of what had been earned by Casey prior to its default and which the City was permitted to retain from progress payments until satisfactory completion of the contract, and second, the City could retain $9,715.24, which had been earned by Casey prior to default but which had not become payable under Article 41's procedure as outlined above.

The cases upon which the Casualty Company relies to support its claim that the contract gave the City power to retain the sixth progress payment are all distinguishable. In each case, the contract involved explicitly gave the party in the position of the City the right to retain all money in its possession includ-

ing money that was due and payable to the party in Casey's position. See *Scarsdale National Bank & Trust Co.* v. *United States Fidelity & Guaranty Co.*, 264 N. Y. 159, 162 (1934) ["'such moneys as may be due or may at any time thereafter grow due * * *'"]; *United States Fidelity & Guaranty Co.* v. *Triborough Bridge Authority*, 297 N. Y. 31, 34 (1947) ["The contract * * * provided * * * [that the] Authority should have the right to withhold * * * any payments due the contractor * * *"][9] *Aetna Casualty & Surety Co.* v. *United States*, 4 N. Y. 2d 639, 643 (1958) ["Partial payments could be withheld * * * if [the party in the City's position] felt that work was not progressing satisfactorily"]. Cf. *Slattery* v. *National Commercial Bank & Trust Co.*, 247 App. Div. 221 (Third Dept. 1931).

Indeed, the fact that this contract did not specifically give the City power to withhold funds that had become payable when other contracts, one involving the City of New York,[10] have explicitly provided for such power, is further support for our conclusion. *People* v. *Continental Casualty Co.*, 157 Misc. 15, 22-23 (Sup. Ct. Albany Cty., 1935); cf. *American Radiator Co.* v. *City of New York*, 223 N. Y. 193 (1918).

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[9] The language quoted in Judge Fuld's paraphrase of the contract, the precise language of which is not set forth in his opinion or in the opinions below. See 48 N. Y. S. 2d 16 (S. Ct. N. Y. Cty.); 269 App. Div. 978 (First Dept.).

[10] One of the parties to the contract in *Aetna Casualty*, *supra*, was the New York Housing Authority.

V.

Although the Yonkers Bank did not move for summary judgment, this court may direct the district court to enter summary judgment if all the issues were before the district court and no material issue of fact is disputed. See 6 Moore Federal Practice, para. 5612; compare *Fountain* v. *Filson,* 336 U. S. 681 (1949). On the record we find no material issues of fact.

VI.

Finally, we must briefly consider Liberty Mutual's appeal. We think that Liberty Mutual's cross-claim, based upon Casey's alleged failure to pay insurance premiums, should not prevail in this action irrespective of whether the Yonkers Bank or the Casualty Company has a right to the fund. Liberty Mutual did not file a lien until after the payment had become payable to Casey. Therefore, its claim is inferior to the Yonkers Bank which was entitled to the fund as soon as it became payable to Casey.

We reverse the award of summary judgment and remand the case with directions to enter judgment for the Bank in the sum of $47,133.90.

APPENDIX C

Section 220-a of New York Labor Law provides as follows:

> "Before payment is made by or on behalf of the state or of any city, town, village or other civil division of the state of any sum or sums due on account of a contract for a public improvement it shall be the duty of the comptroller of the state or the financial officer of the municipal corporation or other officer or person charged with the custody and disbursement of the state or corporate funds applicable to the contract under and pursuant to which payment is made to require the contractor and each and every subcontractor from the contractor of a subcontractor to file a statement in writing in form satisfactory to such officer certifying to the amounts then due and owing from such contractor or subcontractor filing such statement to or on behalf of any and all laborers for daily or weekly wages or supplements on account of labor performed upon the work under the contract, setting forth therein the names of the persons whose wages or supplements are unpaid and the amount due to each or on behalf of each respectively, which statement so to be filed shall be verified by the oath of the contractor or subcontractor as the case may be that he has read such statement subscribed by him and knows the contents thereof, and that the same is true of his own knowledge. As amended L. 1956, c. 750, § 2, eff. April 1, 1956."